No. 12,237

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

GEORGE RUMEH,
Appellee,

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

BERTHA LUCILLE RHODES,
Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States for the District of Arizona.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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In this brief the parties will be referred to by their designations in the District Court, viz.: Appellant as plaintiff, and Appellees as defendants. All figures in parentheses refer to pages of the printed Transcript of Record unless otherwise expressly identified.

I.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Arizona over the parties and subject matter in each of above cases was invoked under Paragraph (1), Section 41, Title 28, United States Code, because: (a) the respective suit is between citizens of different states, plaintiff in each case being a citizen and resident of the State of Arizona, and the defendant in each case being a corporation and citizen and resident of the State of California; and (b) the value of the matter in controversy in each case exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

Jurisdiction is conferred upon this court to entertain and decide the case upon these appeals by Sections 1291 and 1294, Title 28 (New) United States Code, in that a verdict of the jury for the sum of Twenty-one Thousand Dollars in favor of the plaintiff, George Rumeh, was returned in the case of *George Rumeh v. Pacific Greyhound Lines* (No. Civ. 67—Globe, U. S. District Court) on November 4, 1948 (60); and on the same date the jury returned a verdict for the sum of Eleven Thousand Dollars in favor of the plaintiff, Bertha Lucille Rhodes, in the case of *Bertha Lucille Rhodes v. Pacific Greyhound Lines* (No. Civ. 426—Tucson, U. S. District Court) (60). On November 4, 1948, judgment was entered in the *Rumeh* case, No. 67, in favor of the plaintiff and against the defendant in the sum of Twenty-one Thousand Dollars in accordance with the verdict (2); and on the same date judgment was entered in the *Rhodes* case, No. 426, in favor of the plaintiff and against the defendant in the

sum of Eleven Thousand Dollars in accordance with verdict (2, 4).

Thereafter, and within the time allowed by law, defendant in each case, Rumeh, No. 67, and Rhodes, No. 426, filed its motion for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict, and alternative motion for new trial (28-34). Upon stipulation such motions were submitted upon briefs and it was further stipulated that the court could render its orders from the State of California (34-35).

On March 7, 1949, the court entered its orders denying motions for judgment notwithstanding verdict and for new trial in each case (35-41). On March 31, 1949, defendant filed Notice of Appeal in each case to this United States Court of Appeals for the Ninth Circuit (46-47), together with a Supersedeas and Cost Bond, duly approved by the court (41-46). The cases having been consolidated for trial, it was stipulated the records of the two cases should be consolidated for the purposes of appeal (49). Defendant filed Designation of Record and Proceedings to be Contained in Record on Appeal, together with Reporter's Transcript of the Evidence (48).

II.

STATEMENT OF THE CASE

Both of the above cases arose from the same accident. Each plaintiff was a passenger upon the same bus operated by the defendant and was injured as a result of the same accident. George Rumeh filed the first suit directly in the United States District Court for the District of

Arizona and it was assigned docket No. Civ. 67—Globe. The Complaint in the *Rumeh* case, after alleging the jurisdictional facts, and the fact that defendant was a common carrier of passengers for hire, states that on March 25, 1946, plaintiff Rumeh was a paid passenger on the bus of the defendant from Miami, Arizona, to El Paso, Texas; that the bus was operated and driven by one Cody Bach, an agent and employee of the defendant; that while said bus was traveling through the State of New Mexico, and was in the vicinity of Las Cruces, New Mexico, the defendant, by and through its agent Bach, negligently and carelessly operated the bus so as to cause it to collide with an approaching automobile, resulting in injuries to the plaintiff Rumeh consisting of an aggravation and reactivation of a pulmonary tubercular condition previously existing, a fracture of the right shoulder, shock and other injuries. Rumeh prays recovery in the sum of $95,000.00 (4-8).

Defendant, in its Answer to the Rumeh Complaint, denies all the material allegations, including all charges of negligence, injuries and damages, and sets up as an affirmative defense the fact that at the time and place of the accident the driver of defendant's bus was met with a sudden and immediate emergency, not caused by his own act, and was suddenly and abruptly confronted with imminent peril, and said driver used and exercised his best judgment and efforts under the circumstances to avoid a collision with an approaching vehicle (8-13).

The *Rhodes* case was originally filed in the Superior Court of Pima County, Arizona (13), and was thereafter removed to the United States District Court for the District of Arizona where it was assigned docket No. Civ.

426—Tucson (3, 16-17). Removal was effected in June, 1947, before the effective date of the new acts changing method of removal. The Complaint in the *Rhodes* case sets forth the same accident named in the *Rumeh* case, and alleges that plaintiff Rhodes was a paid passenger on the bus from Safford, Arizona, to Clovis, New Mexico, and alleges that as a result of the collision between the bus and approaching vehicle two of plaintiff's teeth were knocked out, her back and spine were injured and she was otherwise bruised and shaken, and also alleged loss of luggage (13-15). Plaintiff Rhodes originally prayed recovery in the sum of $10,050.00, but trial amendment of Complaint was permitted increasing prayer for recovery to the sum of $25,050.00 (280). The answer in the *Rhodes* case is substantially the same as in the *Rumeh* case (18-20). Upon motion the cases were consolidated for trial (2, 3, 21).

As will appear from the specifications of error the main points relied upon by appellant in this appeal are: First, no act upon the part of the defendant's driver was the proximate cause of the accident and injuries in question, but such were caused by the act of a third person not under the control of the defendant; second, the driver of the bus was met with a sudden and immediate emergency and the accident was unavoidable; third, the damages awarded by the jury are excessive. It is apparent that the argument of such points will require a review of the evidence and an extended statement of the testimony in this Statement of the Case will only be unnecessary repetition.

We think it sufficient at this time to briefly review facts that are not subject to dispute. The accident occurred on March 25, 1946; the plaintiffs were passengers in a bus owned and operated by defendant; the bus was being driven by Cody Bach, an agent of the defendant; he took charge of the bus at Safford, Arizona, and was destined to El Paso, Texas (266). While the bus was traversing a straight highway in the vicinity of Las Cruces, New Mexico (about ten miles from Las Cruces), while it was still broad daylight a Ford automobile approached the bus from the opposite direction—the bus traveling east and the Ford west, there was no obstruction of view (268-269). There was a collision between the bus and the Ford resulting in the injuries complained of.

Pertinent undisputed facts: The highway was paved, the pavement being twenty-one feet in width, and there being dirt and gravel shoulders six feet in width on each side of pavement (147). The bus weighed 18,000 pounds unladen and the Ford about 3,100 pounds (146-147). The collision occurred "right at the south edge of the pavement" (142), *that is at the extreme right side of road looking east—the direction of the bus.* The only skid marks observed by Captain C. J. Salas of the New Mexico State Police who investigated the accident was that made by the bus as it left the pavement at the south of the road—that mark was about 5 feet long (142). The driver of the Ford apparently never applied a brake (145). There was physical evidence on the highway of the point of impact between the Ford and bus—it was at the south edge of the pavement (143). The impact knocked out all the brakes of the bus and it rolled free about 144 feet

along the south side of the pavement after the impact (146). *It is admitted by all of plaintiffs' witnesses that the bus was traveling well on its right side of the road—the south side—and that the Ford swerved and turned from its right side to its left side of the road—that is from the north to the south—and headed straight for the bus.* It is inescapable that the real and dominant cause of the accident was a Ford car turning to the wrong side of the road in front of the bus. We appreciate that plaintiffs contended in the court below and undoubtedly will contend here that the evidence was sufficient to show excessive speed on the part of the bus which prevented the driver from stopping in time to avoid collision, *but it is absolutely certain that if the Ford had not swerved and turned in front of the bus there would have been no accident.*

Defendant, at the close of plaintiffs' testimony, and again at the close of all testimony for plaintiffs and defendant, moved the court to direct a verdict in favor of the defendant upon the following grounds:

> "One, there is no evidence adduced by the plaintiffs showing any negligent act on the part of the defendant.
>
> Two, there is no evidence adduced by the plaintiffs showing that there was any excessive rate of speed.
>
> Three, that it affirmatively appears from the testimony that any act upon the part of the defendant, whether negligent or not, was not the proximate cause of the accident and injuries in question.
>
> Four, upon the further ground that it affirmatively appears from the plaintiffs' testimony that the sole and proximate cause of the accident and injuries in question was not any negligent act upon the part of

the defendant, but was by reason of the acts of a third person not under the control of the defendant.

Five, on the ground that the plaintiffs have not carried the burden of proof required of it in that they have not shown by a preponderance of the evidence that the defendant was negligent in any respect pleaded in the complaints, and they have not shown by a preponderance of the evidence that any act upon the part of the defendant was the proximate cause of the accident and the injuries in question." (233, 234, 279).

Both motions were denied, and the jury returned verdicts in favor of plaintiffs Rumeh and Rhodes in the sums of $21,000.00 and $11,000.00, respectively.

III.

SPECIFICATIONS OF ERROR

No. 1. The Court erred in denying defendant's motion for a directed verdict in each case (233, 234, 279), and in denying defendant's motion for judgment for the defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict in each case (28, 31) (orders denying motions 35-41) made pursuant to Rule 50 of the Rules of Civil Procedure for the District Courts of the United States, upon the following grounds:

(a) The evidence is insufficient to sustain any cause of action or legal claim for relief in favor of the plaintiffs, and is insufficient to support the verdict or judgment in either case, and the verdicts and judgments are not justified by the evidence and are contrary to the evidence and the law.

(b) There is no substantial evidence establishing an act on the part of the defendant which constituted actionable negligence, and the evidence is not sufficient to establish a causal relation or connection between any alleged negligent act of the defendant and the accident or injuries to plaintiffs.

(c) The evidence is insufficient to establish that an alleged negligent act of the defendant was the proximate cause of the accident and injuries, and, on the contrary, it affirmatively and conclusively appears from the evidence that the negligent act of a third person, not under the control of the defendant, produced the accident and injuries and was the proximate cause of the same, and without such negligent act of a third person the accident would not have occurred.

(d) That it affirmatively and conclusively appears from the evidence that the driver of defendant's bus at the time and place of the accident was confronted with a sudden emergency, not caused by his own act, and he exercised his best judgment and efforts under the circumstances, and the accident was unavoidable.

No. 2. The Court erred in denying defendant's alternative motion for new trial made in each case (29, 32) (orders denying motions 35-41) upon the ground that the amount of damages awarded plaintiff in each case by the jury was grossly excessive and not justified by the evidence.

No. 3. The Court erred in denying defendant's alternative motion for new trial made in each case upon the ground that it appears from the evidence and the excessive verdicts and the odd amount found in favor of each plaintiff that the jury was swayed and influenced by pas-

sion or prejudice in arriving at the verdicts, and did not base the same on fact or law.

No. 4. The Court erred in denying defendant's alternative motion for new trial made in each case upon the grounds and for the reasons set forth in Specification of Error No. 1, and paragraphs a, b, c and d thereof.

IV.

ARGUMENT

I. PLAINTIFFS FAILED TO ESTABLISH ANY ACT UPON THE PART OF THE DEFENDANT SUFFICIENT TO CONSTITUTE ACTIONABLE NEGLIGENCE. (Specification of Error No. 1, paragraphs a-b.)

It is conceded, of course, that the defendant was a common carrier of passengers and the plaintiffs were paid passengers upon one of its buses, and we are quite aware of the rule that the defendant was bound to exercise as high a degree of care, skill and diligence in conveying the plaintiffs to their destinations as the means of conveyance employed and the circumstances of the case permitted.

Volume 4, *Blashfield's Cyclopedia Auto Law,* Part 1, Section 2151, pages 52 et seq.

But it is also the rule that "the carrier is not the insurer of the safety of passengers, and under the law the passenger assumes the ordinary and usual danger and perils of such trips."

Alexander v. Pacific Greyhound Lines, 65 Ariz. 187, 177 Pac.2d 229, r.p. 193 Ariz. Rept.

The plaintiffs contended that the defendant was negligent in only one respect and that is that the driver of the bus, Cody Bach, was violating the speed law of the State

of New Mexico, and that caused or contributed to the accident in some manner or form. There is no evidence whatever of any other negligence on the part of Bach or the defendant. The bus was in good condition, the brakes in good working order, it was broad daylight on a straight road, he was operating the bus well on his right-hand side of the road and was a competent, experienced driver.

The burden of proof was, of course, upon the plaintiffs to establish by a preponderance of the evidence that the defendant was negligent and such negligence was the proximate cause of the accident and injuries. It was conceded by all of plaintiffs' witnesses that Bach was operating the bus along the highway in the State of New Mexico, near the City of Las Cruces, in an easterly direction along his right-hand side of the road, that is the south side of the highway, at about 6:00 or 6:10 P.M., on March 25, 1946. It was admitted by all of plaintiffs' witnesses that a Ford automobile was approaching the bus from the east, and that the Ford turned from its right side of the road—the north side—to the left onto the south side in front of the bus and a collision resulted which was the cause of plaintiffs' injuries.

The law of New Mexico, at the time and place of the collision, prescribed a speed limit of 45 miles per hour for automobiles, including buses (147). The plaintiffs contend that the bus was exceeding the legal speed limit. They introduced no proof of the speed at which the bus was traveling. The plaintiffs had only three witnesses who saw the accident and had personal knowledge of the same. They were the two plaintiffs and a Mrs. Viola B. Tuck. Plaintiff George Rumeh testified that before and at the time of the accident he was lying down resting and did

not know how fast the bus was going. Apparently, the speed of the bus did not annoy or disturb him (196). The plaintiff, Bertha Lucille Rhodes, testified she was sitting with her little boy and had no idea of the speed of the bus and did not know there was an impending accident until she was thrown in the aisle. Evidently she sensed no unusual speed (180-183). The witness Viola B. Tuck testified:

> "Q. You say before the time of the accident you were reading and not paying attention to the road and surrounding circumstances?
>
> A. I have made the trip so many times I was perfectly relaxed.
>
> Q. You were perfectly relaxed?
>
> A. Yes, sir.
>
> Q. There was nothing in the operation of the bus that caused you any fear, anxiety or anything of that sort, was there?
>
> A. No, sir.
>
> Q. No unusual operation of any kind, is that right?
>
> A. No, the road dipped and I was used to that." (114-115)

We doubt if there is evidence sufficient to show that defendant's bus was exceeding the 45-mile speed limit. To gain such a fact you will have to engage in strained and far-fetched inferences from the testimony of a traffic expert, Lt. Howard Jones of the El Paso Police Department, computing distances at which an automobile can be stopped when operating at certain rates of speed, or from a statement made by the driver, Bach, to a Captain Salas of the New Mexico State Police, to the effect that he was traveling at his "usual" rate of speed. Assuming, however, that you can reasonably infer that the bus was

operating at a speed greater than 45 miles an hour, it must be admitted that it was not traveling at an excessive or unusual rate of speed because no passenger witnesses sensed or experienced any uneasiness or apprehension.

It is true to determine whether the bus driver was violating a statute and to determine what standard of care should be applied to the defendant we must look to the law of the State of New Mexico, as such was the place of the accident. But the plaintiffs elected at their own volition to bring their actions in the State of Arizona and therefore the application of the standard of care prescribed within the State of New Mexico will be made in accordance with the rules of evidence, inferences and presumptions prescribed by the State of Arizona, the law of the forum.

Sections 380, 595, *Restatement of Conflict of Laws.*

There is some confusion among the various states as to what presumption or inference arises from a violation of a law by the operator of a motor vehicle. In *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, the Supreme Court of the United States stated:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And the Court further held that there is no federal general common law, and the federal courts have no power to make law for the states. Therefore, we assume that this

court will follow the decisions of the Supreme Court of the State of Arizona.

Some courts hold that a presumption of negligence arises from a violation of a statute and the same constitutes negligence *per se*. That is not true in Arizona, however, particularly in respect to violation of speed statutes. Our Supreme Court has repeatedly held that driving at a speed in excess of that provided by statute is not negligence *per se* and such constitutes actionable negligence only when the plaintiff goes further and establishes that the speed violation was the proximate cause of the injuries.

> "Driving at an excessive rate of speed, however, must have been the cause of the accident before it can do more than establish a *prima facie* case against the defendants, for merely driving on the wrong side of the road or at a rate of speed in excess of that provided by statute is not negligent *per se,* but will sustain a verdict only when it is shown that it was the proximate cause of the injury."
>
> *McIver v. Allen,* 33 Ariz. 28, r. p. 36; 262 Pac. 5.

> "Plaintiff's negligence under the findings of the trial court consisted *first* in driving his truck at a speed in excess of that specified in the statute, namely, a speed of about 35 miles per hour. Our code section regulating the speed of motor vehicles is 66-103, A.C.A. 1939, which provides that 'It shall be unlawful for the driver of a motor truck towing a trailer or semi-trailer to drive the same at a speed in excess of twenty (20) miles per hour upon any public highway.' A violation of this statute (Rep. Ch. 11, S. L. 1945) is not negligence per se. It is the law of this jurisdiction that driving in excess of the speed limit does not in and of itself constitute negligence

per se. McIver v. Allen, 33 Ariz. 28, 262 P. 5. *Exceeding the speed limit is not negligence as a matter of law but may be as a matter of fact if it proximately causes or contributes to an accident.''* (Emphasis ours.)

Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, r. p. 113; 166 Pac.2d 816.

There was no causal relation or connection between the bus exceeding the New Mexico speed limit, if such is true, and plaintiffs' injuries. If the Ford car had not left its right side of the road and proceeded to its wrong side of the road in front of the bus, there would have been no accident or injuries no matter at what rate of speed the bus was operating. On the other hand, there is no showing whatever that if the bus had been operating within the 45-mile speed limit of New Mexico the accident could have been avoided. Insofar as the testimony is concerned, the accident would have happened if the bus had been traveling at the rate of only 40 miles per hour. Therefore, there was no causal relation between the speed of the bus and the accident, and under the decisions of the Supreme Court of the State of Arizona there was no actionable negligence on the part of the defendant, and the motions for instructed verdicts in favor of the defendant should have been granted.

II. THE EFFICIENT AND PROXIMATE CAUSE OF PLAINTIFFS' INJURIES WAS THE NEGLIGENT ACT OF A THIRD PERSON AND NOT AN ACT OF THE DEFENDANT. (Specification of Error No. 1, paragraphs a, c.)

The proximate cause of an injury is the primary or moving cause and without which the accident could not

have happened. It is the efficient cause, the one that necessarily sets the other causes in operation.

Salt River Valley Water Users' Assn. v. Cornum, 49 Ariz. 1, 63 Pac.(2d) 639;

Insurance Co. v. Boon, 95 U.S. 117, 24 L.Ed. 395.

Assuming that Cody Bach, the driver of defendant's bus, was driving at more than 45 miles an hour (New Mexico speed limit), yet the speed of the bus was not the cause of the accident and injuries. *The sole and proximate cause was a Ford automobile leaving its side of the road and running into the bus.*

The plaintiffs' witnesses, in describing the accident and the cause thereof, testified substantially as follows: Plaintiff George Rumeh testified that he was in a front seat of the bus, to the right of the driver, and had an unobstructed view (195-196). He was lying down and was awakened when the driver "slammed" on his brakes. The driver "held them down" and Rumeh looked up and saw the Ford car "almost right at us" (196). When he looked up the Ford was "right on him" (204). It is important to note that Rumeh testified that he was aroused by the application of the brakes, *and the driver kept the brakes applied from the time of the first application until collision.* "After I saw he wasn't letting them up, I looked up and saw the Ford right on top of us" (204). Rumeh was thrown from the bus by the collision and therefore has no distinct recollection of the collision itself. The plaintiff Mrs. Rhodes did not see the collision. All that she knows is that she was riding in the bus, seated with her boy, and suddenly found herself in the aisle (191). She must have been thrown by the application of the

brakes or the collision. The testimony of Rumeh and Mrs. Rhodes confirms the fact that the application of the brakes and the collision was very close together—almost momentary.

Plaintiffs' witness Viola B. Tuck claimed to see and know a lot more than Rumeh or Mrs. Rhodes. Mrs. Tuck sued the Greyhound Lines for damages resulting from the same accident. She testified that she was sitting in the third row of seats, behind the driver (101), and she was not conscious of any change of speed in the bus "until the brakes were applied and I was thrown forward breaking my teeth and knocking them out" (102-103). She looked up after she was thrown forward and saw the Ford approaching the bus "on the bus' side of the road" (103), it was just far enough away so she could see the entire Ford car. She identified the distance between the bus and the Ford when she first saw it as being the length of the court room (104). The length of the court room was established at 65 feet (166). When she looked up the driver of the bus was pulling to his right and continued pulling to his right until the time of the impact (117). "As I first glanced up the car was coming straight towards the bus and at the same instant turned sharp left, *and by that time they were together*" (111). She kept her eye on the Ford from the time she first saw it and it was coming "head on", and it was only a fraction of a minute before the collision occurred (116). From Mrs. Tuck's testimony it would appear that the bus was traveling on its right of the road, at a rate of speed that allowed her to relax, then there was an application of brakes of sufficient force to throw her forward and knock out her teeth; she then looked up and at that instant the bus was pulling to its

right and the Ford car was at a distance of about 65 feet heading directly for the bus, and then the Ford "turned sharply to the left" (117). The collision occurred immediately thereafter—"by that time they were together" (111). Under such circumstances, how can it be contended that the bus driver could have avoided the collision?

Lt. Howard Jones was called by the plaintiffs as an expert. He is a Traffic Engineer and Safety Director in the El Paso Police Department. He testified as to braking efficiency of automobiles and the distances within which they could be stopped. He recited a formula from which you can determine the speed of a vehicle from the length of the skid marks left on the road after the application of the brakes. He testified you can stop a vehicle traveling at 20 miles per hour within 20 feet *after the brakes take effect.* But if the vehicle was traveling at the rate of 40 miles an hour it would take 80 feet to stop it after the brakes grip, and if traveling 60 miles it would require 180 feet (159-160). *Estimates of speed are based solely upon the skid marks left on the road* (223). That is, an expert can base his judgment only on the marks left on the road by a full application of the brakes. It takes a driver about ¾ of a second to apply his brakes, that is, if he is met with an emergency it will be about ¾ of a second before the brakes take effect (227). If a car is proceeding at a rate of 50 miles an hour it travels about 70 feet per second. That is arrived at by multiplying the number of feet in a mile by the rate per hour and dividing by the number of second in an hour (226). If a man traveling at the rate of 50 miles per hour meets an emergency and starts to apply the brakes, the car will travel about 51 feet before the brakes take effect (227). If a bus is traveling at the

rate of 45 miles per hour it would take 101.2 feet to stop it after brakes take effect, if it is traveling 50 miles an hour it will take 130 feet (216-217).

Captain C. J. Salas, a witness for the plaintiffs, stated that he was with the New Mexico State Police and investigated the accident in question. He arrived at the scene of the accident at 6:25 P.M., which was about 15 minutes after the time of the accident (128). His testimony clearly establishes where the collision occurred, and skid marks left by the vehicles. He identified the photographs in evidence, being Plaintiffs' Exhibit 5, and Defendant's Exhibits A, B, C and D. He identified the point of impact with a blue penciled "X" on Defendant's Exhibit B (143), the impact occurred right at the south edge of the pavement (131). The Ford appeared to have been entirely off the pavement and on the south dirt shoulder when the impact occurred, and the front wheels of the bus were off the pavement (131-132). The left rear wheels of the bus were on the pavement and were about 4 feet from the edge of the pavement (132). When the collision occurred the bus was at an angle headed to the southeast. The bus came to rest about 144 feet from point of impact and was in the borrow pit on the south side of the road parallel with the pavement (132-133). He examined the road for the purpose of identifying skid marks and other evidence of the accident and went back up the road a distance from the point of impact. He found no skid marks whatever except that appearing in the photographs (229-230). There was no indication on the highway that the driver of the Ford car ever applied his brakes or attempted to stop (145). The force of the collision knocked out the brakes on the bus (146). The only skid mark on the road was that left by

the bus on the pavement at point of impact, and that skid mark was about 5 feet long (142).

The only disinterested eye witness to the accident was William Boone, a witness for the defendant. All plaintiffs' witnesses (other than experts) were parties to the suit, or Mrs. Tuck who was seeking to recover damages from the defendant. Boone testified that he was sitting on the right-hand side of the bus about the middle thereof (243), and he saw the Ford car approaching and it was then on its right-hand side of the road very close to the north edge of the pavement. At that time it was about 180 feet distance from the bus (244). It was traveling at a rate of between 45 and 55 miles per hour (245). A puff of dust called his attention to the Ford, which may have been caused by a blowout or the right wheel picking up dust from the shoulder (244). The Ford pulled back towards the center of the road and then came across in front of the bus (245). The Ford never stopped or reduced its speed (245-246). When the Ford turned to its left the driver of the bus attempted to turn to his right and applied his brakes (248). You could hardly judge any space of time between the time the Ford swerved to the left and the collision—it was momentary (249).

The driver of the bus, Cody Bach, testified that he usually travels about 50 miles an hour, but before he met this Ford automobile he passed a trailer so he slowed up and shifted into third gear, which reduced his speed to 30 or 40 miles per hour (267-268). He passed this trailer and then observed the Ford which was about one-half mile away, and he had not picked up his speed to 50 miles by the time he reached the Ford (268). The Ford was well on its right-hand side of the road—north side—and there

was nothing in its operation to indicate impending danger (268-269). When the Ford was about 40 or 50 feet from the bus, it suddenly swerved to its left in front of the bus (269). When Bach saw the Ford swerve to the left he pulled the bus sharply to the right, trying to avoid a collision, and applied his brakes (270-271). The collision occurred momentarily thereafter (271). When the collision occurred the front wheels of the bus were off the pavement on the south side of the road (271).

We believe we have fairly stated the testimony showing the accident and incidents immediately preceding the same. The bus driver could not have avoided the collision whether he had been going 30, 40, 50, 60 or 70 miles an hour. The sole and only cause of the accident was the fact that a Ford car suddenly left its line of travel and turned in front of the bus. A like situation arose in Arizona resulting in the case of *Alexander v. Pacific Greyhound Lines,* 65 Ariz. 187, 177 Pac.2d 229. In that case the plaintiff was a paid passenger upon a bus of the defendant. There was evidence that the driver of the bus was exceeding the speed limit prescribed by the laws of the State of Arizona, and the Supreme Court, in its decision, admitted that there was sufficient evidence to show speed in excess of the legal limits. In the *Alexander* case, as in this case, an approaching vehicle turned from its line of travel into the line of travel occupied by the bus, and there was a collision and the passenger, Sue Alexander, brought suit. At the close of plaintiff's testimony defendant moved for an instructed verdict upon the ground that the proximate cause of the accident was the negligence of a third person, and not the speed or negligence of the driver of the bus. The lower court granted

the motion, judgment was entered for the defendant, plaintiff appealed, and the judgment of the trial court was affirmed, upon the ground that the proximate cause of the accident was the act of a third person and not the negligent act of the defendant. In the *Alexander* case our Supreme Court stated:

> "The following comments are pertinent to the instant case: There was no proof that the driver of the bus was at any time off his side of the road. Had it not been for the Essex car suddenly leaving its side of the road the accident would not have occurred. The injury to the plaintiff occurred after the bus left the highway and was caused by a palo verde tree struck by the bus. The accident occurred where the highway was straight, meaning without curves. The carrier is not the insurer of the safety of passengers, and under the law the passenger assumes the ordinary and usual dangers and perils of such trips. The testimony as to the rate of speed the bus was traveling was conflicting, but driving at an unlawful rate of speed is not negligence per se; Alabam Freight Lines v. Phoenix Bakery, Inc., 64 Ariz. 101, 166 P.2d 816, but will sustain a verdict only when it is shown that exceeding the speed limit was the proximate cause of the injury.
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> *Alexander v. Pacific Greyhound Lines,* 65 Ariz. 187, r. p. 193; 177 Pac.2d 229.

The facts of the case at bar cannot be distinguished from the *Alexander* case. In both cases there was evidence showing speed in excess of a statutory limit. In both cases an approaching vehicle turned from its line of travel to the left side of the road. In both cases it appears that the accident would not have occurred but for the negli-

gence of a third person. In both cases the bus was rendered out of control by reason of the collision. The facts of the *Alexander* case are stronger against the defendant than the present case, for the reason that in the *Alexander* case the bus traveled 400 feet across the desert after the collision before it was brought under control, and, in the meantime, struck a palo verde tree.

All of the facts point to only one conclusion, and that is, the efficient cause of the accident in question was a negligent act of a third person not under control of the defendant. Plaintiffs introduced expert traffic evidence, but we defy counsel to use the formula introduced by their expert and figure any way that this bus driver could have avoided collision. The court should have granted defendant's motion for instructed verdict, or should have granted the motion for judgment notwithstanding the verdict.

III. THE ACCIDENT WAS UNAVOIDABLE AS DEFENDANT WAS CONFRONTED WITH A SUDDEN EMERGENCY AND EXERCISED ITS BEST JUDGMENT UNDER THE CIRCUMSTANCES. (Specification of Error No. 1, paragraphs a, d.)

There is no dispute but what the driver in this case was confronted with an unexpected crisis. He was operating his bus upon his right side of the road and was entitled to rely upon approaching vehicles staying on their side of the road. A Ford car approached the bus from the opposite direction, and to all appearances intended to keep to the right. The Ford turned out of its course into the line of travel pursued by the bus. This confronted Bach, the bus driver, with an unexpected condition not brought on by his act. He exercised his best judgment under the circumstances and attempted to pull to his right to go

around the Ford, and also applied his brakes. That would be the reaction of any human being.

It is possible that some person, after deliberation, could conceive of some way of avoiding the accident, but this bus driver, when confronted with an unexpected crisis, was not called upon to exercise the same ordered judgment as a person who has time to consider the situation.

Volume 4, *Blashfield's Cyclopedia Auto Law,* Part 1, Section 2163, page 113.

"Failure to think when there is time for *instinctive action only* is not negligence." (Emphasis ours.)

Maiwald v. Public Service of New Hampshire, 41 A.2d 247, 93 N.H. 276.

We contend that plaintiffs' own testimony showed that bus driver, Bach, was confronted with an unexpected crisis, and he exercised the same judgment and efforts that any other person would exercise under the same circumstances. That being true, there was no negligence upon his part.

IV. THE AMOUNTS AWARDED PLAINTIFFS WERE EXCESSIVE AND THE VERDICTS WERE RENDERED UNDER INFLUENCE OF PASSION OR PREJUDICE. (Specifications of Error Nos. 2 and 3.)

We have the unusual situation of a jury rendering verdicts in the sums of $21,000.00 and $11,000.00 for the plaintiffs Rumeh and Rhodes, respectively. The odd amount of the verdicts immediately casts suspicion upon the authenticity of the same. There is no apparent reason from the facts why one verdict should be $21,000.00 instead of $20,000.00, and the other $11,000.00 instead of $10,000.00. They have all the earmarks of being quotient verdicts.

The verdicts are grossly excessive. The plaintiff Rumeh suffered only one fracture and that was of his shoulder, which was more or less inconsequential. His main claim for damages is the alleged fact that tuberculosis had been reactivated. He had suffered with tuberculosis for some years before the accident (198). We need consider only his right lung as his physician, Dr. A. D. Long, appeared to give significance only to the condition of that lung. He examined Rumeh on May 24, 1946 about two months after the accident (82-83) and stated:

> "Well, I found what is evidently an old tuberculosis lesion in the right lung and I found some—that there was some fluid in there, evidently of recent development, and I also found that the right shoulder, arm bone was broken in the shoulder joint." (83)

Dr. Long stated that the X-ray indicated that Rumeh had lesion in his right lung before the time of the accident, which restricted the air space in the lung, but claims the air space had been further restricted by reason of the accident (94). The man had tuberculosis before the time of the accident, and as to whether the accident aggravated it is conjectural and merely a matter of opinion. Before the accident he and his mother owned a grocery store (213), and after the accident they sold it for the sum of $6,000.00 (212). There is no showing that he has lost any earnings by reason of the accident. The only evidence is that he and his mother owned a grocery store and then sold it. When the accident occurred he was 39 years old. Such circumstances cannot possibly justify a verdict in the sum of $21,000.00.

Mrs. Rhodes was a housewife with no earning capacity. She was about 43 years old at the time of the accident.

The accident occurred on March 25, 1946, and the first medical attention she had was a year later, spring of 1947, when she called upon Dr. Delbert L. Secrist (178, 186). At that time, a year after the accident, X-rays were taken which showed that she had spondylolisthesis, which in plain English means that one vertebra of her spine had slipped from its regular position (173-175, 178-179). While her physicians, Dr. Secrist and Dr. N. K. Thomas, were of the opinion that the condition of her spine was due to accident, they could not identify when the accident occurred. All they could say was that the injury had taken place at some time before they examined her, and that examination was made a year after the accident in question in this case. While this spinal condition caused discomfort, the evidence does not indicate that it caused any disability. She had no earning capacity.

A citation of authorities on excessive damages would be useless as each case must stand on its own footing. The amount of damages that may properly be awarded in any particular case depends upon the facts and circumstances of that case, but the amount awarded must not exceed a fair compensation for the injuries inflicted. In this case the jury were not permitted to impose punitive or exemplary damages, nor were they permitted to assess damages by reason of compassion or sympathy. We earnestly insist that the damages awarded by the jury in these cases were grossly excessive and greatly exceeded any compensation to which the plaintiffs were rightfully entitled.

We do not think that the jury gave consideration to the facts of the case, and did not base the verdicts upon fact, but were guided by passion or prejudice or by sympathy and compassion.

V. THE COURT SHOULD HAVE GRANTED DEFENDANT'S ALTERNATIVE MOTIONS FOR NEW TRIAL. (Specification of Error No. 4.)

Defendant's alternative motions for new trial set forth all the grounds contained in Specification of Error No. 1, in paragraphs a, b, c and d thereof. We therefore refer to paragraphs I, II and III of this Argument in support of our contention that at least a new trial should have been granted.

Respectfully submitted,

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